

The

HUNGERFORD LAW FIRM
ATTORNEYS AT LAW

Nancy J. Hungerford
P.o. Box 3010, Oregon City, OR 97045

CONFIDENTIAL
Report of Investigation

Sept. 19, 2019

TO: Mike Blackaby, Chair, Ontario School District Board of Directors

FROM: Nancy Hungerford, Attorney at Law, The Hungerford Law Firm

CLIENT: Ontario School District (OSD)

RE: "8C School District Administration Request"

In response to the request by Board Action on Aug. 1, 2019, for an investigation, I conducted in-person interviews on Aug. 20-21, 2019, and also reviewed board policies, documents and audio recordings before and after interviews.

INTERVIEWED

Mike Blackaby, Board member

Renae Corn, Board member

Eric Evans, Board member

Derrick Draper, Board member

Blanca Rodriguez, Board member

Brian DiFonzo, Board attorney

Nikki Albisu, Superintendent

Eric Norton, Director of Personnel

Krista Simmons, Assistant to Personnel Director

Melissa Williams, Director of Student Services

Taryn Smith, Director of Communications

Jolene Masterson, Board Secretary

Mark Redmond, ESD Superintendent

Jodi Elizondo, Ontario High School Principal

Nathan Sandburg, Ontario High School Vice Principal

Lisa Longoria, Ontario Middle School Principal

Tobey Huddleston, Aiken Elementary School Principal

Marshall Hooker, May Roberts Elementary School Principal

Sara Byrne, May Roberts Elementary School Vice Principal

Andrea Buchholz, Alameda Elementary School Principal

Christi Swan, Alameda Elementary School Vice Principal

Jenny Dayton, Cairo Elementary School Principal

Erin Rines, Pioneer Elementary School Principal

THE ALLEGATIONS, INFORMATION, AND FINDING OF FACTS

The “*8C School District Administration Request (Request Made by 14 of 18 Administrators of 8C School District)*” was provided by Attorney Nathan Rietmann to the District’s Attorney Brian DiFonzo, in early July, 2019. At the Board meeting of Aug. 1, 2019, the Board voted to retain the Hungerford Law Firm to investigate the “*Issues under consideration by Ontario 8C Administration for Legal Recourse.*”

The “Request” indicates that it is directed at “[t]he behavior of Eric Evans and Derrick Draper [which] exposes the district to liability and is hurting student achievement and success.” Attorney Nancy Hungerford interviewed the above-listed individuals on Aug. 20- 21, 2019. Each “Issue” is discussed below, not necessarily in the order of listing in the document:

ISSUES: CIVIL RIGHTS VIOLATIONS; CREATION OF AN UNSAFE AND HOSTILE WORK ENVIRONMENT

The “Request” lists as two of four “Issues” for possible “legal recourse,” alleged “[c]ivil rights violations regarding treatment of female administrators and Hispanic female administrators” and “creation of an unsafe and hostile work environment through intimidation and harassment.” This charge involves actions by both Draper and Evans, as discussed below.

Board Policies and Law

The District’s policy GBA on “Equal Employment Opportunity” requires that “[e]qual employment opportunity and treatment shall be practiced by the district regardless of race, color, religion, sex, sexual orientation, national origin, marital status, age, veterans’ status, genetic information, and [disability]” [emphasis added].

The only other policy relating to “[c]ivil rights violations on the basis of sex” is GBN/JBA (“Sexual Harassment”), which prohibits “conduct or communication ... so severe, persistent or pervasive that it has the purpose or effect of unreasonably interfering with . . . an employee’s ability to perform his/her job/ or creates an intimidating, offensive or hostile educational or working environment.” However, the policy also provides that a precondition of any claim of sexual harassment is that it in some way is “verbal, nonverbal or physical conduct of a sexual nature.”

These policies reflect state law regarding harassment, which require a showing that the harassment was based upon membership in a protected class.¹

The Board has also adopted Policy GBNA (“Hazing/Harassment/Intimidation/Bullying/Menacing/Cyberbullying – Staff”) stating that “[t]he Board is committed to providing a positive and productive learning and working environment. Hazing, harassment, intimidation, bullying, menacing, and acts of cyberbullying of staff, students or third parties by staff, students or third parties is strictly prohibited and shall not be tolerated in the district. . . Staff whose behavior is found to be in violation of this policy will be subject to discipline, up to and including dismissal. Third parties whose behavior is found to be in violation of this policy shall be subject to appropriate sanctions as determined and imposed by the superintendent or Board.”

¹ The Policy cites ORS 659.850, which provides (1)As used in this section, “discrimination” means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability. . . (2)A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.

Administrative Rule GBNA-AR defines “third parties” as includ[ing], but not limited to, coaches, school volunteers, parents, school visitors, service contractors or others engaged in cooperative work programs with the district . . .” However, once again, both “harassment” and “intimidation” are prohibited acts only if they are “on the basis of race, color, religion, national origin, or sexual orientation.”

Incident #1, which involved concerns about the conduct of both board members Draper and Evans, occurred at the June 24, 2019, Board meeting.

Evans, as Board Chair, presided over this meeting, which included a preliminary Board work session at 6 p.m., with the audience consisting of the Board secretary, attorney, Superintendent, Finance Director, and Director of Communications. The Board discussed Board communications, including a training that had been held with an OSBA staff member. The Board also discussed a possible District survey. Evans indicated that he had been thinking about the need for a District survey in order to pass a bond, and he had reached out to a consulting firm in Portland, which would conduct a survey for \$29,500. Other board members and staff discussed prior surveys, the need for a survey, what it would cost, and the need to identify the intent of the survey. Several Board members indicated a need for more information and further discussion before deciding to do a survey.

The Regular Session of the Board was called to order by Chair Evans at 7:02, with several additional administrators present, and many community members for a total of approximately 60 people in attendance, according to the official Board minutes. Following consent items, reports from the Director of Finance and Superintendent, and “Board Bits,” five members of the public spoke to the Board regarding “loss of some of our best teachers,” bond failures, staff living outside of the boundaries of the City of Ontario, and the need for positive partnership with the community and parents. The Board then held a Budget Hearing and adopted the budget, approved a “Healthy and Safe School Plan,” and a football camp trip.

At that point, the agenda item related to a District Survey was discussed. Board members Corn, Blackaby and Rodriguez expressed reservations about a survey, including a need to contact OSBA and the District’s attorney to determine legal parameters. Board member Blanca asked whether this survey would solve the problems regarding bond passage. At that point Chair Evans said, *“Do I think that’s the magic bullet, no. But do I think that opens up the conversation, where, were it actually opening up a conversation, where it’s actually giving them [the public] a voice. It has been so long. [To the audience] “When is the last time you guys thought you had a voice?”* This prompted numerous interjected remarks by members of the audience, about young people not voting, losing “good people,” employees scared of repercussions, and Board member Draper’s question about why “good Ontario people are going to work in Nyssa or Vale.”

At that point, Principal Longoria, sitting in the audience, responded, asking whether the audience members had talked to school staff. Although Chair Evans attempted to contain the ensuing back-and-forth comments among audience members and Longoria, it continued with further discussion about similar topics, including losing good teachers. Chair Evans interjected at one

point, *"So, we're done, hold on,"* but the audience members continued with additional comments from the floor, without being recognized or given permission to speak. Longoria again spoke, asking audience members, *"Have you observed them?"* pointing out confidentiality requirements controlling what administrators can discuss, *"And if you want to talk about getting rid of good teachers have you observed that, where is your data that shows that they are good?"* Chair Evans interrupted: *"Okay, we're done, we are done. Done. 'kay? If I have to shut everybody down, I'm going to shut everyone down."* Longoria, responded: *"You are going to do it on me."* Chair Evans said, *"Yep."* After further audience reaction and calling out, Longoria stated *"Come into my classrooms and observe with me, I would love for you to. . "* Chair Evans then addressed Longoria by name (*"Lisa, we're done"*), but then added, *"So, I would, ah. . .Any other comments?"* At that point Board member Draper urged, *"Let's put it to a vote"* and moved to retain the research consultants *"so that we can start down this path."*

The motion failed 3-2. Director Corn indicated a desire for more conversation on the topic and more information, and the need for more community involvement. The meeting adjourned at 8:15 p.m.

Findings of Fact

The "Request" (p. 16) alleges that Evans' conduct at the Board meeting of June 24, "immediately silencing the only administrator (Hispanic female) who spoke out at the meeting when he let all community members speak out freely without interruption demonstrates not only a lack of fairness and impartiality required of a board member or an ability to lead a meeting appropriately, it further speaks to his disrespect toward women and insensitivity toward minorities and equality."

Evans may be justly accused of lapses in leading a board meeting that was, at one point, contentious and out-of-control, and in fact inviting the verbal "free-for-all" of public discussion about the possible reasons for bond failures. However, after listening to a tape recording of the meeting, it appears that Evans' calling out for Longoria to stop talking was not motivated not different treatment based her sex or race, but rather based on her role as a school administrator. She was the only administrator talking, perhaps the only one who might be expected to comply with his directive. Evans did not apply similar attempts to rein in the community members in the audience.

There is not a preponderance of evidence that Evans discriminated on the basis of sex or race, as he allowed both male and female community members to shout out, while silencing the only school employee speaking out. While Longoria unquestionably felt that she was being treated differently, it cannot be established that such different treatment was because of her race and/or sex. Evans acknowledged that the meeting was getting out of control and expressed the wish "that I could have handled it differently."

The 26-page "Requests" document contains no other instance of alleged sexual or racial discrimination or any allegation of sexual harassment on the part of Evans.

Incident #2: Alleged Discrimination/Harassment by Draper on the basis of sex

The “Request” states (p. 1): *“It has been noted repeatedly over time by the predominantly female administrative staff as well as male administrators that Derrick [Draper] communicates with men on the administrative team in a more consistently respectful manner (not yelling, listening, no interrupting) than he does with women (does not hesitate to yell, demean, insult, ignore, dismiss opinions, exhibit aggressive physical gestures).”*

Finding of Facts

This part of the “Request” focuses on Draper’s conduct in a meeting with Supt. Albisu and Principal Elizondo in the Superintendent’s office on June 3, 2019.

The meeting was requested by the administrators in response to Draper’s May 29 email to Elizondo, in which he wrote: *“I understand that she [high school teacher] is teaching freshman next year and that she and the kids aren’t very happy about that. Also, that she is looking for other positions. We are losing a lot of great teachers accord to what [Draper’s child] is telling me! What is going on?”* Following an lengthy explanatory emailed response by Elizondo, on May 30 Draper sent an extensive second email, beginning *“The Public’s perception of our schools is ultimately in the toilet right now. That was proven to me emphatically by the percentage that the bond failed. Yes, we are doing somethings right, however, there are a lot of things wrong we aren’t doing right. Our relationships with people I feel are strongly suffering. These kinds of things don’t set well with our patrons and community.”* In the remainder of the email, Draper discusses concerns about the teacher who was reassigned to teaching freshmen, a concern about the hiring of a choir teacher and the departure of the previous choir teacher, and coaches quitting their positions. After reading the email, Elizondo initiated a request for a meeting with Draper and Albisu.

Both Draper and Albisu noted that it took some time to schedule the meeting, and both agreed that Draper was reluctant to meet. The “Request” asserts that during the June 3 meeting, Draper *“exhibited behavior intended to physically and professionally intimidate Jodi [Elizondo] and Nikki [Albisu]”* – that he *“repeatedly rose out of his seat to a partial standing position to enter the personal space of Jodi while screaming, pointing, pounding on his chest, and slamming his hands on the table. He screamed so loudly and consistently at both Nikki and Jodi the entirety of the 15 minute meeting that the entire district office, to include patrons in the lobby, could hear what was happening and stopped activity in alarm. . . Despite being asked repeatedly to stop screaming, lobbing personal insults, and allow Nikki and Jodi to speak, he would not. Nikki had to stop the meeting at which time Derrick stormed out of the office. . .”*

In a follow-up email exchange, Draper emailed Elizondo and asked why another high school teacher had resigned; Albisu answered by emailing Draper the teacher’s response; Draper responded, *“That’s BS! She doesn’t want to be black balled by Jodi. . .”*

When interviewed, the two administrators remembered the meeting as described above. Several of the interviewed Central Office staff who were present in the office that day indicated that although the door to Albisu’s office was closed during this meeting, and thus they could not hear

exact words, they heard Draper responding in loud and angry tones, and at least one saw him “storming out of the office.”

Draper indicated in his interview that *“I didn’t want to meet with them. I knew it would be heated. I’m a passionate guy.”* While he remembers the meeting didn’t begin with argument, *“it became heated . . . I’m sure I raised my voice.”*

Conclusion

The preponderance of the evidence indicates that Draper conducted himself inappropriately in this June 3, 2019 meeting with Elizondo and Albisu, in violation of Policy BBF (“Board Member Standards of Conduct”), requiring that “Board members will treat other Board members, the superintendent, staff, and the public with dignity and courtesy. . . and “Give the staff the respect and consideration due skilled, professional employees.”

Draper’s conduct prior to and on June 3, 2019 was also inappropriate under the policy BBAA, “Individual Board Member’s Authority and Responsibilities.” His intervention regarding the assignment of a teacher to a particular grade level or class was an attempt to enforce his personal opinions, but a Board member does not exercise any authority as an individual, only as a part of the board during officially called meeting. (At other times, Draper seems to recognize the limits of his individual authority. For example, in an email of Feb. 6, 2019, to the Superintendent after insistent demands about athletic equipment and supplies, he wrote: “I need to apologize! Honestly, I don’t want to put any more burden on you than is already there. You’re doing an amazing job and I appreciate that. Please accept my apology. Let’s visit and clear the air when you have time.”)

It is difficult to assess whether Draper’s conduct toward Elizondo and Albisu was based on the sex of the administrators involved. Reports about Draper’s conduct vis-à-vis administrative staff prior to June, 2019, were not different, whether coming from male or female administrators. Interviews with other administrators indicated that their only interactions with Draper personally had occurred at parent-teacher conference nights or other events at the schools where his children attended. Draper’s conduct was not considered problematic on these occasions prior to spring, 2019. Several administrators reported positive interactions with him in resolving isolated concerns about his children’s education.

All of the District’s principals as well as Superintendent and business manager are female. The only male administrators are two vice principals, and support staff in Personnel and IT who are not so immediately involved with decision-making of apparent interest to Draper. Further, Draper’s emails to a former Athletic Director (male) demonstrate some of the same frustration and hyperbole (“Why on earth are we sending our JV softball girls to Fruitland to play a home game. We have an arrangement with TVCC to use the field for the JV. Why aren’t we? This is absolutely ridiculous! “)

It is similarly uncertain whether Draper’s conduct at the June 3, 2019 meeting constitutes a violation of Policy GBN/JBA (“Sexual Harassment”), which prohibits “conduct or communication . . . so severe, persistent or pervasive that it has the purpose or effect of

unreasonably interfering with . . . an employee's ability to perform his/her job/ or creates an intimidating, offensive or hostile educational or working environment." While that part of the definition may seem to fit on occasion, "harassment" and "intimidation" is prohibited by that Policy only when it is based on protected class status, such as sex. There is insufficient evidence that Draper's conduct fits that part of the definition.

ISSUE: USE OF BOARD POSITION TO ACHIEVE PERSONAL AGENDA

Policy BBF ("Board Member Standards of Conduct") requires Board members to "[r]efuse to bring personal or family problems into Board considerations," and to "Give the staff the respect and consideration due skilled professional employees."

The "Request" raised issues about Draper's conduct concerning a specific event, during spring 2019 parent/teacher conferences, when he allegedly "*verbally assaulted the choir teacher,*" stating, "*Why would anyone ever put their student in your class*" and "*You took a pristine program created by [former teacher] and destroyed it.*" According to the "Request," this first-year teacher was distraught and felt intimidated, crying in the Principal's office afterward; "*When confronted with this information, Derrick [Draper] did not deny it and his defense of his behavior indicated he felt he had a right to treat our teacher that way and would not hesitate to do so again. When told she cried, his response was 'Maybe she needed to cry', as though she deserved to be punished.*" The "Request" [p. 17] cites a "*long history of this behavior,*" and Draper's using the power of his board position "*to create a fear of retaliation, something he has proven he does which makes it a reality instead of a possibility.*"

Draper responded that he attended the conference with his wife and middle-school-aged child. "I may have said one sentence. My wife was making these statements," he recalled.

The teacher has since quit and moved to Colorado, but was interviewed about the conference, which began with a discussion of how the Drapers' child was doing in choir, then continued with a general discussion of classroom behavior issues and cancellation of some performances. The parents asked why they should put their daughter in choir the next year when she could enroll in Spanish or an AP class instead. She recalls being asked, "Why aren't you able to run the program when it was handed to you [by the former teacher]." Both parents talked, but the "louder portion was mostly him [Draper]," the teacher recalled. She emphasized that the parents' concerns were appropriate but not the manner in which those concerns were delivered. Other parents had questions as well, she recalls. "I don't fault the Drapers' their concerns, just the manner they were presented." The conversation made her cry, and she went to fellow teachers and the principal for support.

The teacher responded that she did not know at the time of the conference that Draper was a member of the school board.

Draper returned to the topic of the choir teacher in his email of May 30, 2019 to Elizondo, wanting to "have a discussion with whoever hired the last choir teacher. She was absolutely

horrible with no experience and took a state champion choir to the dumps in a year! Some of our most talented choir kids quit because of the mess that was created. Meanwhile, our old choir director is 12 miles south building a program that in one year took 2nd in the state. [The former choir teacher] left because she felt unsupported at our school.”

In the same email, Draper also criticizes the reassignment of the teacher to teach freshmen, citing another of his children for information about student opinion, stating this teacher “has been so good to my kids and many many others over the years. . . I am a great judge of character and [his wife][and] I can smell out a bad teacher before we even get to the school. [This teacher] is a great teacher.” In this and other emails, he complains about the District not hiring a local OHS graduate as a first-year teacher (telling administrators that it was their job to hire him and “make him a better teacher,” and for not hiring a current teacher/coach to be athletic director.

Conclusions:

While Board members may have children attending District schools, or may have special interest in certain programs, such as athletics or music, Policy BBF, “Board Member Standards of Conduct,” states the “the Board sets the standards for the district through Board policy. Board members do not manage the district on a day-to-day basis”; also Board members are required to “[r]efuse to bring personal or family problems into Board considerations” and to “[p]resent personal criticism of school operations to the superintendent, not to school staff or to a Board meeting.” Policy BBAA, (“Individual Board Member’s Authority and Responsibilities”) requires that “Board members will not intervene in the administration of the district or its schools.”

Board member Draper’s conduct in the teacher conference was unnecessarily abrasive and traumatizing to the first-year teacher. However, he did not attempt to use his position as a Board member to make an impression on the teacher.

Nevertheless, Draper’s conduct in pressuring District administrators to hire certain individuals or assign certain individuals to classes of their choice crossed the line into violation of Policy BBF and BBAA. Draper’s attempts to bend administrative decision to his preferred outcomes is also a violation of BBF’s requirement that Board members exercise any control of the District only as a part of the whole Board, by action taken in public session by a majority of the Board.

District policies do not prohibit Board members from focusing on certain areas of the school program. Certainly, Draper had personal interests in particular programs, including athletics, music, and TAG. As he emailed to Principal Elizondo on May 30, 2019, “I get that graduation rates are absolutely wonderful. But lots and lots of our students don’t come to HS for graduation rates. They come to play sports or sing in the choir or play band instruments. They come to look forward being taught their junior year by a fabulous teacher. . . who relates to students and loves what she does.” Each Board member may have a personal viewpoint on “what is best for students,” but only exercises control over decisions about staff selection and program design as part of the total Board, at officially called Board meetings.

ISSUE: “PARTICIPATING AND ORGANIZING DIVISION BETWEEN THE SCHOOL AND COMMUNITY”

Policy BBF directs Board members to “[g]ive the staff the respect and consideration due skilled, professional employees,” but also to “[r]espect the right of the public to attend and be heard at Board meetings” and to “[r]espect the right of the public to be informed about school decisions and operations.”

The “Request” by administrators alleges that Draper and Evans organized the attendance at Board meetings of like-minded citizens, that Evans and Draper welcomed and interacted with these citizens before and after the meeting but did not greet the administrators in attendance; that the public comments were “clearly very organized and scripted, with a clear target on the high school administration and the non-resident administrators, to include the superintendent”; that many of the community attendees came to the meeting with a copy of the board and superintendent’s goals, which Draper and no one else had requested earlier in the week; that Evans allowed community members to start shouting their opinions, including disrespectful comments toward Director Rodriquez, without stopping or warning a community member, but silenced an administrator.

Findings of Fact

This complaint appears to be focused on Draper’s and Evans’ conduct before and after the June 24, 2019 Board meeting, during which time a large and apparently organized crowd of community members appeared at the Board meeting. Draper acknowledges that “I heard about people coming to the Board meeting. Some were personal friends, people I hunt and fish with.” However, he insists, “They purposely didn’t come to me.”

While Draper’s and/or Evans’ involvement in organizing these community members to attend is impossible to gauge without much additional investigation and interviewing, Draper and Evans’ conduct at the meeting in greeting and conferring with the patrons bringing complaints, while notably ignoring administrative staff, suggested they were “taking sides.” Draper acknowledged, “That was my mistake. I should have walked down the center aisle and said hello to both sides.” Evans likewise acknowledged the importance of “not singling anyone out,” either favoring or disfavoring persons in attendance.

Board policies don’t prescribe the minutiae of appropriate conduct for a Board member at a public meeting. Policy BBF directs Board members to “[g]ive the staff the respect and consideration due skilled, professional employees,” but also to “[r]espect the right of the public to attend and be heard at Board meetings” and to “[r]espect the right of the public to be informed about school decisions and operations.” It is possible and required for a Board member to exhibit support for the right of both the staff and public to respect and civil treatment, and Draper and Evans could have attempted to set a less adversarial tone for the meeting. Both Draper and Evans should have been sensitive to the impression they created that they were only interested in the participation and attendance of a group of community members, and not interested in any contributions by the school staff in attendance.

SUMMARY AND COMMENTS

The Ontario School District has much to be proud of in the manner in which its staff and community support the needs and interests of students to a K-12 education that promotes both academic achievement and involvement in extracurricular activities. The current and previous boards have assembled an administrative staff that has dedication to those goals, but also a need for recognition and support. With active leadership from all Board members, hopefully all community members and staff can rally behind their common goals of providing excellent facilities and programs for students, now and in the years to come.

Mediation may be a desirable next step in an effort to involve the community and staff in moving forward to maintaining a productive working relationship.

Thank you for the opportunity to work for the District.

s/ Nancy J. Hungerford

Nancy J. Hungerford
THE HUNGERFORD LAW FIRM

